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Federal or State Jurisdiction Over Atomic Products and Waste-- A Dilemma

By JAMES N. NEEL, JR.*

The AEC has approved for public comment terms of a proposed agreement with the Commonwealth of Kentucky for the transfer of certain of the Commission's regulatory responsibility over byproduct (radio isotopes), source (uranium and thorium), and special nuclear materials in less than a critical mass (U-233, U-235, and plutonium), pursuant to section 274 of the Atomic Energy Act of 1954, as amended.¹ The Commission will consider public comments which are received before acting upon the final form of the agreement. Since Kentucky will, unless there is some unforeseen circumstance, become the first state in the nation to execute the federal-state agreement,² the terms of the

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¹ 68 Stat. 919 (1954), 42 U.S.C. §§ 2011-2281 (1958 Supp. II, 1960).

² 26 Fed. Reg. 7889 (1961). Initial presentation of Kentucky's regulatory program was made by Governor Bert Combs to AEC Commissioner L. K. Olson on September 20, 1960. Certain modifications to the initial proposal were made by the state in consultation with the AEC Staff, and on July 6, 1961, Chairman Seaborg received the completed proposal from Kentucky's Attorney General John B. Breckinridge, Chairman of the Kentucky Advisory Committee on Nuclear Energy. The proposed agreement reads as follows:

Whereas, the United States Atomic Energy Commission (hereinafter referred to as the Commission), is authorized under § 274 of the Atomic Energy Act of 1954, to discontinue within the States its regulatory responsibility for source, byproduct, and special nuclear material in quantities not sufficient to form a critical mass, and;

Whereas, the Commonwealth of Kentucky (hereinafter referred to as the Commonwealth), desires to assume regulatory responsibility for source, byproduct and special nuclear material in quantities not sufficient to form a critical mass, and;

Whereas, the Governor of the Commonwealth certifies to the existence of a program for the control of radiation hazards adequate to protect the

(Footnote continued on next page)

agreement are of importance to all states which may desire to assume regulatory authority over these materials.

As presently constituted, the agreement is a restatement of the statutory authority for the transfer, the desire of the Commonwealth to assume responsibility, the certification of the Governor as to the existence of a program for the control of radiation hazards with respect to the material covered by the agreement, and the Commission's findings that Kentucky's program is compatible with the Commission's program for the regulation of such materials and is adequate to protect the public health and safety. Then follow four articles covering the extent of the transfer of authority, the express and optional areas of regulatory reservation,

(Footnote continued from preceding page)

public health and safety with respect to the materials within the Commonwealth covered by this agreement, and;

Whereas, the Commission has found that the program of the Commonwealth for the regulation of the materials covered by this agreement is compatible with the Commission's program for the regulation of such materials and is adequate to protect the public health and safety;

Whereas, this agreement is entered into and is subject to the provisions of the Atomic Energy Act of 1954, as amended.

Now, therefore, it is hereby agreed between the Commission and the Commonwealth as follows:

Article I. With respect to activity in the Commonwealth, the Commission, subject to exceptions provided in Article II of this agreement, agrees to discontinue its regulatory authority with respect to the following materials:

- (a) Byproduct materials;
- (b) Source materials; and
- (c) Special nuclear materials in quantities not sufficient to form a critical mass.

Article II. This agreement does not apply to the following activities:

- A. The construction and operation of any production or utilization facility;
- B. The export from or import into the United States of byproduct, source, or special nuclear material or of any production or utilization facility;
- C. The disposal into the ocean or sea of byproduct, source or special nuclear waste materials as defined in regulations or orders of the Commission;
- D. The disposal of such other byproduct, source, or special nuclear material as the Commission determines by regulation or order should, because of the hazards or potential hazards thereof, not be so disposed of without a license from the Commission;
- E. The authority of the Commission to require, by rule, regulation or order, that the manufacturer, processor, or producer of any equipment, device, commodity, or other product containing source, byproduct, or special nuclear material shall not transfer possession, or control of such product except pursuant to a license issued by the Commission.

Article III. This agreement shall not affect the authority of the Commission under Subsection 161 b. or i. of the Atomic Energy Act of 1954, as amended, to issue rules, regulations, or orders to protect the common defense and security, to protect restricted data, or to guard against the loss or diversion of special nuclear material.

Article IV. This agreement shall become effective on December 1, 1961.

the authority of the Commission to regulate in the interest of the nation's security, and the effective date of the agreement.

Concurrently with the publication of the proposed Kentucky-AEC agreement, the Commission has also published a proposed regulation for comment which could have a tremendous effect on the amount of federal regulatory power transferred to Kentucky and other qualifying states. The purposes of the proposed regulation are to provide a convenient means for exempting persons in "agreement state," that is, states with which the Commission has entered into an effective agreement under section 274 of the Atomic Energy Act, from Commission licensing requirements, and to define activities in agreement states over which the regulatory authority of the Commission continues.³

The regulation does not merely reserve to the Commission regulatory power over the three areas required by the Atomic Energy Act—production and utilization facilities, import and export of nuclear material, or facilities into or from the United States, and ocean or sea waste disposal. Two additional subsections exercise the optional authority of the Commission to retain control over *all* waste disposal and the transfer or sale of devices containing nuclear materials. As to waste disposal other than at ocean or sea, the proposed regulation provides that the exemption from Commission licensing requirements in agreement states does not apply to persons who receive nuclear waste materials from Commission or state licensees for disposal. This rules out state jurisdiction over the disposal of waste of state licensees and any possibility of state controlled waste disposal areas except those created pursuant to federal license and control. As to transfer of devices, the proposed regulation specifies that notwithstanding the exemptions for persons in agreement states, no person who is the manufacturer, processor, or producer of any equipment, device, commodity or product listed in the subsection which contains source, byproduct, or special nuclear material may transfer possession or control of such products except pursuant to a license or an exemption from licensing under other regulations of the Commission.⁴ The regulation specifies certain products which may only be transferred pursuant to a license of the Com-

³ Proposed AEC Reg. §§ 150.1-9, 26 Fed. Reg. 7885-b (1961).

⁴ Proposed AEC Reg. § 150.8(a)-(e), 26 Fed. Reg. 7886 (1961).

mission and in its last paragraph closes the door to state licensing of the transfer of all devices by including any other devices not mentioned specifically which contain source, byproduct, or special nuclear material.

The effect of this regulation is to create duality of administration by the federal and state governments over nuclear materials. If the regulation is adopted, the agreement state may license only the receipt, possession and use of nuclear material; it may not license the manufacturer, processor, or producer of any equipment, device, or commodity, who desires to market or transfer products containing nuclear materials. The manufacturer would have to obtain a license from the Commission to market his product and a license from the state to produce it. The state could also license the user. The state would assume the duty of inspecting the plants and customers but would have no jurisdiction over what manufactures could market. This would concentrate in Washington all determination as to radiation hazards to the public associated with the utilization of devices containing these materials.

Within these areas of optional retention of authority exists a basic conflict between the Kentucky proposal and the proposed AEC regulation, for Kentucky proposes to assume all regulatory control presently authorized under section 274 of the Atomic Energy Act. It is the purpose of this article to explore this proposed regulation with the idea of determining its appropriateness for adoption at this time and its possible effect on the transition of authority to the states in line with Congressional intention as expressed in section 274 and its legislative history.

EXPRESS AND OPTIONAL AREAS OF RETENTION

Section 274 provides for express retention of certain areas of regulatory activity presently under Commission control. These are: the construction and operation of a production or utilization facility; the export from or import into the United States of byproduct, source, or special nuclear material; the disposal into the ocean or sea of byproduct, source, or special nuclear waste materials as defined in regulations or orders of the Commission, and special nuclear materials in quantities sufficient to form a critical mass. Optional areas of control, that is, areas of regulatory control

authorized for transfer to the states provided retention is not exercised by the Commission, include the disposal of such other byproduct, source, or special nuclear materials which, because of the hazard or potential hazards thereof, the Commission determines by regulation or order should not be so disposed of without a license from the Commission and the transfer of the possession or control of equipment, devices, commodities, or other products containing source, byproduct, or special nuclear materials which the Commission determines by rule, regulation, or order may be transferred only by a license issued by the Commission.

LICENSING OF TRANSFER OF DEVICES

As specified by the act, the purpose of section 274, among other things, is to recognize the interest of the states in the peaceful uses of atomic energy; to clarify the respective responsibilities under the Atomic Energy Act of the states and the Commission with respect to the regulation of byproduct, source, and special nuclear materials; to promote an orderly regulatory plan between the Commission and state governments with respect to nuclear development and use, and regulation of these materials; and to recognize that as the states improve their capabilities to regulate effectively, additional legislation might be desirable to transfer control over other areas presently retained.

The report of the Joint Committee on Atomic Energy on the federal-state bill stated specifically that it was not intended to leave any room for the exercise of dual or concurrent jurisdiction over byproduct, source, or special nuclear materials. The materials were to be regulated and licensed either by the Commission or by the states, but not by both.⁵ Congress, by passage of section 274, affirmed the states' right to regulate in areas of health and safety which have traditionally been subject to the police powers of the states, and recognized that it was time to cede to the states jurisdiction over hazards associated with certain radioactive materials, subject to the states' competency to cope with problems associated with radiation hazards. It is clear from the Joint Committee's report and the hearings on the bill that Congress was concerned about the possibility of duality of regulation over

⁵ Joint Committee on Atomic Energy, Report on Public Law 86-373 (1959).

licensees. Indeed, as stated before, a prime purpose of the legislation was to clarify the respective jurisdictions of the federal and state governments. It was recognized that duality of administration or concurrent jurisdiction of licensees could create a situation which could seriously impair the utilization of these materials by science and industry.

If the proposed regulation part 150 is adopted, the Commission will be establishing duality of administration over users of nuclear materials in agreement states. For example, a manufacturer, prior to producing his product, would have to go to Washington for a license to transfer the possession of the device to prospective users. After obtaining his federal license, he would make application to the state licensing agency for a license to manufacture the device. The state would review his application and the federal license he received concerning the transfer of the device and then make a determination as to whether a state license should be issued based upon hazards associated with receipt, possession, or use of the device. If the device contained more than the generally licensed⁶ quantities of radioactive material, the user to whom the device was transferred pursuant to the federal license would also be required to obtain a specific license⁷ from the state. Thus, a complex federal and state licensing procedure involving immense red tape for persons utilizing these materials would exist with the result of negating the very purposes for which the Congress enacted section 274.

DEVELOPMENT OF STATE COMPETENCY AND EXPERTISE

The act looks forward to the transfer of greater responsibility over nuclear materials to the states as they develop competency and acquire personnel capable of dealing with hazards associated with these materials. Since proposed part 150 would remove from state jurisdiction the responsibility of determining whether or not

⁶ General license means a license effective pursuant to regulations promulgated by the state agency without the filing of an application to transfer, acquire, own, possess or use quantities of, or devices or equipment utilizing byproduct, source, special nuclear materials, or other radioactive material occurring naturally or produced artificially.

⁷ Specific license means a license issued after application to use, manufacture, produce, transfer, receive, acquire, own, or possess quantities of, or devices or equipment utilizing byproduct, source, special nuclear materials, or other radioactive material occurring naturally or produced artificially.

a device utilizing nuclear materials is capable of being transferred into the environment without hazard to the public, and assumes that the federal government alone is capable of making that determination, the state could not get the experience of dealing with this problem—experience so necessary for the development of expertise and competency within the state which will enable it in the future to regulate more complex areas presently under federal jurisdiction.

An objection, raised by a few manufacturers in the radiation field favoring continuing jurisdiction of the Commission over the licensing of devices for transfer, is that if this jurisdiction is not retained by the federal government, the producers of these devices will face a multitude of conflicting and non-uniform regulatory and licensing schemes in and among the states subsequent to relinquishment of control by the Commission. They point out that the industry is already burdened with a complex scheme of licensing control, but if they must have their devices licensed for use in fifty jurisdictions, an unbearable situation will be created which will seriously impair the utilization of nuclear materials by science and industry. This problem has been alleviated by a provision in the Kentucky agreement permitting reciprocal recognition of licenses of states which have executed an agreement with the Commission and licenses of the Commission. Thus, a manufacturer in State X, which has executed an agreement with the federal government, may distribute his device to users in Kentucky pursuant to a general license of Kentucky, provided that the device has qualified for distribution to the public at large and has been manufactured pursuant to a specific license issued by State X.⁸

EXERCISE OF OPTIONAL AREAS OF JURISDICTION

An objection exists as to the procedure by which the proposed regulation was issued for publication in the Federal Register by the Commission. The proposed exercise of the optional jurisdiction over waste disposal appears to be premature and without good cause shown, for as to waste disposal the statute specifies that the Commission must make a determination that because of

⁸ The same reciprocal arrangement exists as to licenses of the federal government.

hazards or potential hazards, byproduct, source, or special nuclear waste material must not be disposed of without a license from the Commission. The Commission's decision must not be an arbitrary one but must be based upon hazards or potential hazards and the state's incompetency to cope with these hazards. To this date, there is no evidence in the public domain that the federal government alone can cope with these hazards. The regulation has been proposed and published, constituting notice to the public, without any documentation in existence on which to base intelligent discussion among the states and between the states and the federal government concerning the states' inability to cope with the problem. If the states are not competent to handle waste products of their own licensees, how can they be competent to handle the receipt, possession and use of these materials by the same licensees? The point is that the states *are* competent or can be made competent by the acquisition of additional personnel and equipment. Further, the states will not obtain jurisdiction over disposal of waste products of licensees at any rate until a finding that they are competent has been made as required by federal law.

As to transfer of devices, an agreement state may still effectively control the presence of radioactive products in its jurisdiction, even though the federal government retains jurisdiction over the transfer or sale of products, because the state may license the possession, receipt, and use and may still bar a device it thinks unsafe, regardless of what the Commission assumes is proper for sale or transfer. Again, if the states are capable of licensing the receipt, possession and use of devices utilizing these materials, why are they not competent to license the transfer or sale?

SECONDARY EFFECTS OF THE FEDERAL-STATE AMENDMENT

A secondary effect of the federal-state amendment has been to generate new impetus within and among the states toward the development of over-all radiation control programs covering not only byproduct, source, and special nuclear materials but all sources of ionizing radiation, including sources which have always been under state control such as x-rays, particle accelerators and radium. At the present time these sources constitute approximately ninety per cent of the potential hazard of harmful exposure to radiation within the environment. Proposed part 150 would

undoubtedly have an adverse effect on the increasing interest in the development of control programs, for many states will not wish to assume the responsibilities without final authority to determine the possible hazards associated with the transfer of devices utilizing nuclear materials and the disposal of nuclear waste created by persons within the state. There is a vast difference between assumption of complete responsibility (except as to reactors, ocean and sea disposal and import and export) over hazards associated with the use of these materials and taking over the inspection functions of the Commission. Transfer of the latter will not constitute decentralization of regulatory authority but merely a shifting of the burden of inspection tasks that the AEC is hard pressed to cope with because of limitations of staff and personnel.

SUMMARY

Exercise of optional areas of authority by the Commission should not be arbitrary but only for good cause shown. At this time there is no documentation or evidence in the public domain to justify the retention of this authority by the Commission and the resultant barring of the states from the licensing of transfer of devices and disposal of waste materials. The promulgation of the proposed regulation could frustrate Congressional intent as expressed by the federal-state amendment to the Atomic Energy Act by:

1. Creating a complex regulatory system with dual administration over licensees that could seriously impair the utilization of these materials by science and industry;
2. Seriously impairing the development of competency and expertise within the states to handle more and greater responsibility in the field as is a specified intent of the federal-state amendment;
3. Constituting action by the Commission without a prior determination that the necessity for action truly exists;
4. Harming the presently developing radiation control programs of the states by reducing the desire of the states to participate in the program of divided regulatory responsibility.